Supreme Court, U.S.
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No. 03-1566

IN THE

Supreme Court of the United States

FRANCIS A. ORFF, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

The question presented is whether farmers are "intended" third-party beneficiaries of their irrigation district's water service and repayment contracts with the United States Bureau of Reclamation and, therefore, entitled to sue the Bureau for breach thereof, as the Federal Circuit has long held, or merely "incidental" third-party beneficiaries and, therefore, not so entitled, as the Ninth Circuit holds in the decision below.

LIST OF PARTIES

The plaintiffs and appellants below, petitioners here, are Francis A. Orff; Brooks Farms II; Brooks Farms IV; Brooks Farms V; G.S. Farms; Five-D Westside Farms, Inc.; R&S Farming; Cardella Ranch; Gramis Family Farms II; Edwin R. O'Neill, BRO Partnership; BTO Partnership; EJC Partnership; ERO Partnership; JEO Partnership; SLO Partnership; TBO Partnership; C.S. Stefanopoulos Trust; Elena Stefanopoulos Trust; Estate of Helen Stefanopoulos; D.D. Stefanopoulos Trust; Pagona Stefanopoulos; Sumner Peck Ranch, Inc.; Y. Stephen Pilibos; and Pilibos Children's Trust.

Westlands Water District intervened in the Court of Appeals as an appellant.

The defendants and appellees below, respondents here, are United States of America; United States Department of the Interior; Bureau of Reclamation; Fish and Wildlife Service; United States Department of Commerce; National Marine Fisheries Service; Ronald H. Brown, Secretary of Commerce; and Bruce Babbitt, Secretary of Interior.

Parties who intervened below as defendants and appellees are Natural Resources Defense Council; United Anglers of California; Save San Francisco Bay Association; California Waterfowl Association; Sierra Club; Bay Institute of San Francisco; Environmental Defense Fund; California Striped Bass Association; Trout Unlimited of California; Sacramento River Council; California Sportfishing Protection Alliance; Pacific Coast Federation of Fisherman's Associations; the Wilderness Society.

CORPORATE DISCLOSURE STATEMENT

None of the petitioners has a parent corporation nor a nonwholly owned subsidiary.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Orff, et al. v. United States, et al.*, 358 F.3d 1137 (9th Cir. 2004). Pet. App. A. The Ninth Circuit affirmed the district court's unreported Final Judgment, filed August 11, 2000, and Memorandum Opinion and Order re Federal Defendants' Motion to Reconsider, filed April 12, 2000. *Id.* at B, C.

STATEMENT OF JURISDICTION

The Ninth Circuit's judgment was entered February 18, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case presents a question of federal government contract law which is not directly dependent on statute. *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 289 (1958), *reh'g denied*, 358 U.S. 805 (1958). However, resolving the question involves various statutes, including Section 8 of the reclamation act of 1902. Pub. L. No. 57-161, § 8, 32 Stat. 388, 390 (June 17, 1902) (codified at 43 U.S.C. §§ 372, 383).

STATEMENT OF THE CASE

A. The Reclamation Legislation: Contract and Property Rights

The Bureau of Reclamation of the United States Department of the Interior constructs and operates water projects in the 17 western states and sells and delivers irrigation water for use by farmers. The reclamation program, under which the Bureau was created, was originally enacted in 1902. Its main purpose was to complete the development of irrigation in the arid west, a task private enterprise had started, but was financially unable to complete. The legislation provided Congress would fund massive irrigation projects involving major

supply works, such as dams, reservoirs, and canals, and local distribution systems. The Bureau's costs of construction and operation and maintenance were to be substantially repaid by land assessments and water charges.[1] The 1902 act also provided that no right to the use of water was to be sold for land exceeding certain acreage limits, thus requiring the benefits of a project to be distributed widely.[2] The 1902 act has been repeatedly amended, including significant reforms in 1922, 1926, 1939, 1956, and 1982.[3]

The quantity of water to be delivered by the Bureau and used by farmers in a service area, and the consideration to be paid by the farmers, are governed by the reclamation legislation, as well as the contracts, state water right permits, and judicial decrees which implement it. In particular, the program depends, in major part, on the contract and property rights which arise in connection with its implementation.[4]

During the first quarter century of the program's existence, the Bureau contracted directly with individual farmers to supply irrigation water. A farmer submitted to the Bureau a

[1] *California v. United States*, 438 U.S. 645, 649, 650, 663-64 (1978).

[2] *Ivanhoe*, 357 U.S. at 292, 297.

[3] The Bureau has built and operates more than 600 dams with over 50,000 miles of canals to deliver water to almost 10 million acres. Amy K. Kelley, *Federal Reclamation Law*, *in* WATERS AND WATER RIGHTS § 41.02 (Robert E. Berk ed., 1996).

[4] "The legislation establishing and expanding these projects has created a highly complex system of rights and interests, some in the Government, some in the districts, some in the individual water users . . . ." *Burley Irrigation District v. Ickes*, 116 F.2d 529, 539 (D.C. Cir. 1940), *cert. denied*, 312 U.S. 687 (1941). As the case at bar demonstrates, these rights constitute a "complex system" in several respects. Some aspects of the rights are created by federal law, others state law. A right may derive from contract, property, judgment, or statute. Actions of multiple actors—federal, state, and local, as well as private—are involved. And this complex system of rights develops over an extended period of time.

water right application which, upon acceptance, constituted a water right contract between them. LAWS AND REGS. RELATING TO THE RECLAMATION OF ARID LANDS BY THE UNITED STATES, 45 Land Dec. 385, 404, 408 (May 18, 1916). In 1922 Congress provided that the Bureau had the option of entering into a contract with an irrigation district, or with the farmers. 43 U.S.C. § 511. In 1926 Congress provided that no water would be delivered from a new project until a contract had been made with a district organized under state law that provided for payment of the cost of constructing and operating and maintaining the waterworks. *Id.* at § 423e.[5] The legislation also required that owners of excess land shall execute "recordable" contracts with the Bureau in which they agree to sell their land after a certain term at a price which takes no account of the water provided by the project. *Id.* In 1939 Congress delineated the nature and function of "repayment" contracts with districts under which the Bureau recovers the costs (except interest costs) of constructing intra-district distribution works. *Id.* at § 485h(d). The 1939 legislation further provided that the Bureau could also use "service" contracts to recover such costs and the operation and maintenance costs of major supply works. *Id.* at § 485h(e).

Property rights are a key feature of the reclamation program. Section 8 of the 1902 act provides that nothing therein shall be construed to "interfere" with the laws of any state relating to the "control, appropriation, use or distribution" of water used in irrigation, or any "vested right" acquired thereunder; the Bureau, in carrying out its provisions, "shall proceed in conformity with such laws;" and nothing therein shall "affect any right of . . . any landowner, appropriator, or user of water." 43 U.S.C. § 383. Section 8

[5] The purpose of these statutes was administrative convenience, as discussed in point II.D of the Argument. The nature of a water district is discussed in point III.D.

further provides that the "right to the use of water" acquired thereunder shall be "appurtenant to the land irrigated," and "beneficial use shall be the basis, measure, and limit of the right." *Id.* at § 372.[6] Congress reenacted Section 8 in 1956. *Id* at § 485h-4.[7]

B. Foundations of the Water Rights: The Project, Unit, District, and Permits

The Central Valley Project in California was authorized in 1937. Act of Aug. 26, 1937, ch. 832, 50 Stat. 844, 850. The authorizing act provided that reclamation law would govern repayment of costs of necessary works, the Bureau could enter into necessary contracts, and it could acquire necessary water rights. *Id.*

One of the CVP's key features is Shasta Dam at the northern reaches of the Sacramento River. Water collected behind it is released by the Bureau, flows southward to the Sacramento-San Joaquin Delta, and is diverted by opening the gates of a cross channel located in the north of the Delta and, then, lifted from the Delta by means of the Tracy Pumping Plant to flow through the Delta-Mendota Canal to the Mendota Pool on the San Joaquin River for distribution to certain CVP units in the south.[8]

In anticipation of the authorization and construction of the CVP unit at issue here, farmers on the west side of the San Joaquin Valley organized the original Westlands Water District in 1952 under the California Water District Law.

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[6] In the 1926 legislation Congress referred to "the water right attaching to the land." *Id.* at § 423e.

[7] This Court has explicated these property rights statutes in several leading cases, which are discussed in points II.D and III.A of the Argument.

[8] The CVP, as it existed prior to development of the unit involved in this case, is described in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728-29 (1950) and *Ivanhoe*, 357 U.S. at 279-84.

Cal. Water Code § 34000 *et seq*. The original District was a 400,000 acre area, where petitioners farm.

California water districts are authorized to contract with the Bureau for an irrigation water supply. *Id.* at §§ 23179, 23195-97, 35400, 35851, 35875, 35878. All water, the right to use of which is acquired by a district under any contract with the United States, shall be distributed and apportioned by the district in accordance with the applicable acts of Congress and the provisions of the contract. *Id.* at § 23200. A water district is authorized both to charge water users for service and to assess the lands they own or operate. *Id.* at §§ 35470, 35474, 36550 *et seq*.

Under the law of the arid western states, surface water is appropriated and distributed under the doctrine of prior appropriation.[9] California law requires any appropriator, including the Bureau, to apply for and obtain a permit from the State Water Resources Control Board. Cal. Water Code §§ 1201, 1250.[10]

The original District filed with the State Board an application for water rights in 1954. AER 2. It assigned that application to the Bureau in 1960 for use in the proposed CVP unit. AER 2, 4/114. The Bureau requested such assignment because the application carried an early priority date and assignment would expedite construction. AER 22. The

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[9] In *Arizona v. California*, 283 U.S. 423, 459 (1931), the Court defined appropriation of water, as follows:

> "To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the state where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations."

[10] The basic principles of California prior appropriation law are discussed in point II.E of the Argument.

Bureau promised that a permanent water supply for the District would be made available from the unit pursuant to a reclamation contract. *Id.*

The Bureau subsequently obtained from the State Board the necessary water rights to build the unit. The State Board rendered four decisions which ordered that permits be issued for the "benefit" of the farmers. The farmers were to be the "true owners" of the permanent right to use the water, subject to contract compliance. The right was to be "appurtenant" to land to which water is applied. Decision D-893, 1958 WL 5645 at 34, AER 16/426; Decision D-935, 1959 WL 5685 at 47-50, AER 17/459-61; Decision D-990, 1961 WL 6816 at 36-37, AER 3/97-98; Decision D-1020, 1961 WL 6846 at 10, AER 4/133-34.

The San Luis Unit was authorized by Congress in 1960 as an integral part of the CVP. Act of June 3, 1960, Pub. L. No. 86-488, 74 Stat. 156. Section 1(a) of the 1960 act establishes the principal purpose of the Unit as furnishing irrigation water to the west side of the San Joaquin Valley. It provides that the principal engineering features shall include, among other things, the San Luis Dam and Reservoir, the San Luis Canal, and intradistrict distribution systems.[11] It directs that, in building and operating the Unit, the Bureau shall be governed by federal reclamation law. Section 1(a) also mandates that construction shall not be commenced until the Bureau has secured all rights to the use of water necessary to carry out the Unit's purposes. Section 8 of the 1960 act

[11] The authorizing legislation was discussed in a recent case brought by farmers in the original District against the Bureau challenging its failure to provide drainage service, as required. *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 570, 571, 573-74 (9th Cir. 2000).

requires contracts providing for repayment of the distribution systems.[12]

The original District embraced the majority of the Unit's service area, and several smaller districts occupied the rest. Water for the Unit flows to the Tracy Pumping Plant located in the Delta, is pumped south through the Delta-Mendota Canal, is stored in the San Luis Reservoir, and thereafter resumes its flow through the San Luis Canal and, then, the District's internal distribution system to farmers' lands.[13]

C. The 1963 and Related Contracts

The water users in the original District are beneficiaries of a 1963 water service contract between it and the Bureau pursuant to which the Bureau furnishes water and they bear their share of the costs of constructing and operating and maintaining major supply facilities. JA 27-61. The landowners are beneficiaries of a 1965 repayment contract pursuant to which they repay the costs of the internal distribution system. *Id.* at 62-91. Recordable contracts were also made by the Bureau and most landowners in the late 1960s and early 1970s relating to the sale of their lands in excess of acreage limits. *Id.* at 92-100. All these contracts contain preambles and recitals stating they were made pursuant to federal reclamation statutes. *Id.* at 30, 64, 92. The district

[12] The Unit is described in *Westlands Water District v. United States*, 337 F.3d 1092, 1096 (9th Cir. 2003). President John F. Kennedy attended, and offered remarks at, the ground-breaking ceremony for the San Luis Dam. 337 Remarks in Los Banos, California at the Ground-Breaking Ceremony for the San Luis Dam (August 18, 1962), *in* PUBLIC PAPERS OF THE PRESIDENTS: JOHN F. KENNEDY 1962, 627-29 (". . . [T]he benefits that will come from [this great cause of making water available] are unique and special.")

[13] For maps of the CVP, the Unit, and the District, respectively, *see* www.krisweb.com/hydor/tr311.jpg, www.usbr.gov/mp/sccao/sld/docs/Factsheet2.pdf, and www.usbr.gov/mp/sccao/sld/docs/Drainage%20Need.pdf.

contracts recite they were made under applicable state law. *Id.* at 30, 82.[14]

Two articles of the 1963 contract form the basis of the petitioners' claims for damages in this case. Article 3(d) provides that each year the Bureau "shall furnish" 900,000 acre-feet of water to the District for use on its eligible lands.[15] Article 3(d) provides that the original District "shall . . . pay for" the water under Article 6(a), which provides that the water service component of the rate "may not be in excess" of $7.50 per acre foot.[16]

Several articles of the 1963 contract refer to the water rights of landowners and water users. The first sentence of Article 15 refers to the "right to any water" furnished thereunder possessed by any "tract of land or water user" in the District. The third sentence thereof states payment is a prerequisite to "the right to the use of water" so furnished and no "water user" shall demand water unless he or she has paid the required charges. Articles 23(a), 24(e) and 25(b) impose conditions on excess landowners' "right to receive water made available pursuant to this contract." Finally, Article 3(f) of the 1963 contract provides that the "right to the

[14] Several cases have noted the farmers' status. *Barcellos & Wolfsen, Inc. v. Westlands Water District*, 899 F.2d 814, 816, (9th Cir. 1990), *cert. denied, Boston Ranch Co. v. Department of Interior,* 498 U.S. 998 (1990) ("beneficiaries"); *United States v. Westlands Water District*, 134 F.Supp.2d 1111, 1156(E.D. Cal. 2001) ("real parties-in-interest"); *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F.Supp. 715, 731, 732, 746 (E.D. Cal. 1993) ("third-party beneficiaries").

[15] The quantity terms of the 1963 contract were later discussed by the Ninth Circuit in *O'Neill v. United States*, 50 F.3d 677, 680-81 (9th Cir. 1995), *cert denied*, 516 U.S. 1028 (1995).

[16] The price terms were discussed in two cases involving claims by original District farmers against the Bureau. *Barcellos & Wolfsen*, 899 F.2d at 816, 824 n.16;*Westlands*, 134 F.Supp.2d at 1118, 1138-39.

beneficial use of water . . . shall not be disturbed" so long as the District fulfills its obligations.[17]

Several other articles of the 1963 contract refer to third-persons' rights and remedies through or under the District. Article 9(c) relates to water used for irrigation by the District or "those claiming by, through, or under the District." Article 11(b) specifies a remedy for certain claims of the District or "anyone having or claiming to have by, through, or under the District" the right to use the water. Article 11(c) prohibits such remedy in relation to any water actually furnished to and used "by, through, or under" the District.[18]

The 1963 contract also recited lands in the District need additional irrigation water and water to meet such needs can be made available by Bureau works. Articles 1(a) and 12 provide the water is for agricultural use. Article 5 prohibits water being used outside the District.[19]

In July 1963, the original District filed an *in rem* action in state court seeking to validate the 1963 contract. AER 24/490-91. This was done under Article 32 of the contract and applicable statutes. 43 U.S.C. §§ 423e, 511. In December 1963, the court validated the contract as against all persons. It declared the contract and each provision is "valid," "authorized by law," and "binding upon the respective parties thereto." AER 25 at 503-05.

In 1965 the District and the Bureau executed a repayment contract providing for construction, operation, and financing

[17] These articles are discussed in point II.A of the Argument.

[18] These articles are discussed in point II.B of the Argument.

[19] President Kennedy remarked upon the execution of the 1963 contract at the White House. 41 Remarks at the Signing of Water Resources Development Contracts (January 28, 1963), *in* PUBLIC PAPERS OF THE PRESIDENTS: JOHN F. KENNEDY 1963, 104-05 (". . . [t]he largest water service contract in the history of the reclamation program . . . will [make] available [water] to about 350,000 acres . . .").

of the intradistrict distribution system. JA 62-91. It recited the Bureau will furnish CVP water to the District pursuant to the 1963 contract, and the District desires a system to utilize such supply. Article 2(b) provides the system will include facilities to deliver water from the Canal to approximately 400,000 acres of irrigable land. Article 13 parallels Article 15 of the 1963 contract.[20]

During the late 1960s and early 1970s, as construction of Unit works was completed and water became available, excess landowners, including petitioners or their predecessors, signed recordable contracts with the Bureau, as required by reclamation law and Articles 23, 24, and 25 of the 1963 contract. Each was explicitly made "in consideration of the direct and indirect benefits to be derived under the terms" of the 1963 contract, as "implemented" thereby, by all of the lands of the landowner within the District, and as an "inducement" to the Bureau to make water and distribution facilities available to the District for the excess land of the landowners.

Until 1978, the Bureau honored the rights of the pre-merger District and its farmers under the quantity and price terms of the 1963 contract. Farmers in that area bought at least 900,000 acre-feet of water each year and paid no more than $7.50 per acre-feet for such service. As a result, the water rights for the Unit were perfected and preserved under

[20] In 1965, the District and a newer, smaller district on its western border, which had no contract with the Bureau, merged. Cal. Water Code § 37800 *et seq*. Section 37856 of the merger legislation provides that "[l]ands" which were within the District immediately prior to the merger shall have a prior "right with respect to water" to which the District was entitled under any contract with the Bureau over "lands" added to the District as a result of the merger. The right with respect to water of pre-merger lands over merged lands was later discussed in *Sumner Peck Ranch*, 823 F.Supp. at 720-21, 726-27.

state law and the appropriate share of project costs was repaid under federal law.[21]

D. The 1986 Stipulated Judgment

Notwithstanding the above, between 1979 and 1986, the Bureau attempted to reduce water deliveries for fish and wildlife purposes and to raise prices of the remaining water for budgetary purposes. District court litigation ensued among class representatives of pre-merger area lands, class representatives of merged area lands, the District, and the Bureau with respect to such underdeliveries and overcharges.[22]

During the litigation several events occurred which cemented the farmers' right to sue the Bureau for breach of the quantity and price terms of the 1963 contract. First, in 1980 the district court rejected the Bureau's defense of sovereign immunity. *Barcellos & Wolfsen, Inc. v. Westlands Water District*, 491 F.Supp. 263, 266-67 (E.D. Cal. 1980).[23] Second, as part of the Reclamation Reform Act of 1982, Congress enacted 43 U.S.C. § 390uu, which gave consent to join the Bureau as a necessary party in any district court suit to adjudicate the contractual rights of a contracting entity and

[21] The initial performance of the Bureau was addressed in *O'Neill*, 50 F.3d at 680-81.

[22] This litigation was later discussed in several cases adjudicating claims by pre-merger area farmers against the Bureau. *O'Neill*, 50 F.3d at 681; *Barcellos & Wolfsen*, 899 F.2d at 817; *Westlands*, 134 F.Supp.2d at 1118-20. A detailed description of the 1979-1986 litigation is contained in the court-approved class notice. AER 26.

[23] The court concluded it would administer rights to the use of water previously adjudicated in the state validation case, citing 43 U.S.C. § 666(a)(2) and *Federal Youth Center v. Jefferson County District Court*, 195 Colo. 55, 59-60, 575 P.2d 395, 398 (1978). It also concluded it would adjudicate in the class action rights to the use of water acquired to operate the Unit, citing 43 U.S.C. § 666(a)(1) and *Dugan v. Rank*, 372 U.S. 609, 617-19 (1963).

the Bureau regarding any contract executed pursuant to federal reclamation law. Pet. App. D.[24] Third, in 1984 the Court of Appeals for the Federal Circuit ruled in *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1576 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985), that farmers were "intended" third-party beneficiaries of their irrigation district's reclamation contracts with the Bureau and, thus, were entitled to sue the Bureau for breach.[25]

The litigation was resolved in 1986 by a stipulated judgment, which construed in part and modified in part the 1963 contract, and enforced it as so construed and modified. JA 101-47. Paragraph 2 declares it is to govern the rights and duties of all parties until December 31, 2007. Paragraph 4.1 declares that the 1963 contract is a valid, enforceable and implementable contract, and commands that the Bureau shall perform it. It also declares that the contract entitles the District to water and other service by the Bureau, as specified therein. Paragraphs 4.4, 8, and 9 further awarded the farmers a refund of about $50 million for past overcharges and

[24] The Senate report states the section consents to suit concerning the contractual rights of those who are "parties or beneficiaries" of reclamation contracts. S.REP. NO. 97-373 at 18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2570, 2582. In the House, Representative Kazen stated that the "contracting district and the people in it" might have valid arguments which ought to be considered in the appropriate forum, and a committee amendment gives "the irrigation districts and their members" access to the courts. 128 CONG. REC. 8816, 8817 (1982). Representative Clausen stated it allows the "farmers" to sue the Bureau. *Id.* The conference report states the committee's actions should not be prejudicial to "any particular form of remedy" under existing law. Buffalo Bill Dam, Reclamation Reform, and Papago Indian Water Rights, Conference Report, H.R.CONF.REP. NO. 97-855 at 33 (1982).

[25] The Court of Federal Claims has jurisdiction to render judgment upon any claim against the United States founded upon any express or implied contract with the United States. 28 U.S.C. § 1492(a)(1).

declares the future rate to be $7.50 per acre foot, as specified in the 1963 contract.[26]

The 1986 stipulated judgment contains two provisions which directly bear upon the issue presented here. First, Paragraph 4.2 declares: "The District acknowledges that it entered into the 1963 Contract for the benefit of [the pre-merger area] and the lands therein." Second, Paragraph 3 of the stipulated judgment specifies remedies of the parties, including farmers, declaring, in relevant part, as follows:

> ". . . [A]ny other appropriate relief may be obtained against the Federal parties by the filing of a new action for violation of . . . any contract or other right or obligation arising independently of this Judgment, notwithstanding that (i) it is required to be performed by this Judgment, . . . or (iii) it is otherwise a subject of this Judgment."[27]

Paragraph 23 declares the stipulated judgment is not a contract "as described in Section 203(a) of the 1982 Act," which is codified at 43 U.S.C. § 390cc(a). The court-approved settlement notice explains the purpose of Paragraph 23 is simply to insure that the stipulated judgment does not inadvertently render the 1982 act applicable to all District lands.[28]

[26] The 1986 stipulated judgment was discussed in several of the subsequent cases involving farmers' claims against the Bureau. *O'Neill*, 50 F.3d at 681; *Barcellos & Wolfsen*, 899 F.2d at 819, 825-26; *Westlands*, 134 F.Supp.2d at 1120-21; *Sumner Peck Ranch*, 823 F.Supp. at 737, 738.

[27] The representatives of pre-merger area farmers stated in the court-approved settlement notice that their rights set forth in the 1963 contract will be set forth in the stipulated judgment and thereby become "directly enforceable." AER 27/528.

[28] The 1982 act gave individual landowners the option to increase acreage limits in exchange for paying higher water rates. *Barcellos & Wolfsen*, 899 F.2d at 817-18; *Westlands*, 134 F.Supp.2d at 1119.

The stipulated judgment was controversial in certain quarters. Congress had required that it rest there for 30 days before becoming effective. Act of Dec. 19, 1985, Pub.L. No. 99-190, § 122, 99 Stat. 1185. It was thereafter approved by Congressional inaction.[29]

In the late 1980s excess land owners sold their lands at pre-project values, as required by the 1963 contract and their recordable contracts, and various new settlers bought those lands. Pet.App. A at 3a. During the late 1980s and early 1990s the price and quantity terms of the 1963 contract, as enforced by the 1986 stipulated judgment, were honored by the Bureau, except as described below. *O'Neill*, 50 F.3d at 681.

E. Subsequent Litigation Between the Farmers and the Bureau

Notwithstanding the 1986 stipulated judgment, future sales of water in the quantity and at the rate agreed and decreed were not to be, and litigation between pre-merger area farmers and the Bureau was not to cease.

Within a year of entry of the stipulated judgment, Congress raised the water rate more than fivefold on farmers owning excess lands under extended recordable contracts. 43 U.S.C. § 390ww(h). Farmers moved in district court to challenge the validity of this new surcharge. Their right to sue the Bureau was not questioned, but their claim was rejected on the merits by the court and, then, on appeal. *Barcellos & Wolfsen*, 899 F.2d at 821-26. A majority of the Ninth Circuit panel concluded the price term of the 1963 contract, as implemented by the recordable contracts, was insufficiently explicit and, therefore, should be construed to allow the exercise of sovereign power. *Id.* at 824-25 n. 18.

[29] *Westlands*, 134 F.Supp.2d at 1120 n.20.

Several suits relating to the failure to provide necessary drainage service were also brought. First, farmers owning excess lands claimed entitlement to the 1963 contract rate for so long as the Bureau failed to provide such service. The district court upheld the farmers' claim. *Westlands*, 134 F.Supp.2d at 1134-44. It rejected the Bureau's sovereign power defenses. *Id.* at 1144-54. It also recognized the right of farmers to sue to recoup the payments made for service not provided. *Id.* at 1154-56.

Second, farmers filed a separate action seeking, among other things, to enforce the Bureau's drainage obligations, including to recover contract damages. The district court initially upheld the farmers' pleadings. *Sumner Peck Ranch*, 823 F.Supp. at 737-49. In particular, the court ruled the farmers had the right to sue the Bureau for damages. *Id.* at 745-47.[30]

Still another lawsuit was a precursor to the underdelivery claim in the case at bar. During the 1993 water year, the Bureau reallocated half of the pre-merger area's water so that, instead of being delivered there, it would pass through the San Francisco Bay and flow to the Pacific Ocean to serve certain fish and wildlife interests. Representatives of farmers sought specific performance of (but not money damages for) the Bureau's water delivery duty under the 1963 contract, as enforced in the 1986 stipulated judgment. *Barcellos & Wolfsen, Inc. v. Westlands Water District*, 849 F.Supp. 717, 721-26, 729, 733-34 (E.D.Cal. 1993). The Bureau defended on the ground that it had become impossible to honor the quantity terms of the contract because of subsequent sovereign action.[31] The farmers responded by arguing *inter*

[30] Furthermore, in *Firebaugh*, the Ninth Circuit affirmed in major part the district court's partial judgment compelling the Bureau to perform its statutory drainage obligation. 203 F.3d at 573-74. 577-78.

[31] The Bureau claimed that it reallocated the water pursuant to one or both of two new federal mandates. First, it cited biological opinions of

alia that the statutes on which the Bureau relied were either inoperative or inapplicable or, in the alternative, had not been followed by the government and that the broad mandates in question gave the government discretion to comply with both statute and contract. *Id.* at 724-26, 729, 733-34. The district court abstained from deciding these defenses. *Id.* at 726. However, the court construed certain words of remedial limitation in Article 11(a) of the 1963 contract ("a shortage on account of errors in operation, drought, or any other causes") to include the reallocations, assuming they were later determined to have been mandated by statute. *Id.* at 723-729. The Ninth Circuit affirmed such abstention. *O'Neill*, 50 F.3d at 687-89. It further affirmed that judicial review of such issues would occur, instead, in the case now before this Court. *Id.* at 680, 682. The Ninth Circuit also affirmed the contract interpretation. *Id.* at 682-87.

F. Proceedings Below

In the instant case farmers seek money damages from the Bureau, charging two breaches of the 1963 contract. First, they charge the Bureau reduced the quantity of water it sold by half in 1993 (the reduction involved in *O'Neill*) and by more than half in 1994 in breach of Article 6(d). Second, the Bureau began to assess CVP farmers with "mitigation and restoration payments" under a new statute, as a result of which the farmers' price per acre-foot has been about twice the $7.50 per acre-foot charge specified in Article 6(a).[32]

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federal agencies intended to protect certain salmon and smelt species issued under the Endangered Species Act. 16 U.S.C. § 1536(a)(2). Second, it cited Section 3406(d) of the CVP Improvement Act. Pub. L. No. 102-575, 106 Stat. 4706, 4722 (Oct. 30, 1992). The Bureau argued that the alleged mandates excused it from complying with Article 6(d) of the 1963 contract under the sovereign act doctrine, the unmistakability doctrine, the impossibility doctrine, and Article 11(a) of the 1963 contract. 849 F.Supp. at 721-22, 724-25.

[32] § 3407(c), 106 Stat. at 4726.

The District originally instituted this suit in 1993. The farmers intervened later that year.[33] In 1995 the District moved to dismiss its action "[b]ased on various negotiations and agreements" among it, other districts, the NRDC intervenors, and the Bureau. AER 9/300. The farmers opposed the motion or, alternatively, requested protective conditions. AER 10/314-50. The court granted the District's motion. JA 148-57. Thereafter, the farmers alone prosecuted their contract damage claims.

The main proceedings in the district court consisted of three rounds of cross-motions for partial summary judgment. In 1997 the court denied all motions on the merits. ASER 29/535, 578-79. In 1998 the court rejected the Bureau's argument which claimed, for the first time in 18 years of nearly continuous litigation, that the farmers were not entitled to sue. It held that, because the farmers' lands are "burden[e]d by performance obligations of the water service contract," they were intended third-party beneficiaries. ASER 30/599-603. The court focused exclusively on the farmers' contractual rights, disregarding any property aspects of their water rights. *Id.* at 607-09, 630-31. The court also made two rulings on the merits. First, it narrowly characterized the farmers' underdelivery claim.[34] Second, it dismissed

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[33] The petitioners initially sought equitable relief under a due process theory. *Westlands Water District v. United States Department of Interior*, 850 F.Supp. 1388, 1397-98, 1401, 1408 (E.D. Cal. 1994). The district court initially held the farmers were entitled to pursue their underdelivery claim. *Id.* at 1400, 1401, 1426-27. It granted them leave to amend their overcharge claim. *Id.* at 1408-09, 1426-27.

[34] The court held the Bureau's contractual defense did not give it "carte blanche" to unreasonably or unlawfully deny water to the farmers in derogation of the 1963 contract's intent and purpose. ASER 30/651. It ruled that whether there was sufficient water available to meet "both" contractual requirements and any statutory requirements was a triable issue. *Id.* at 651-52. The court stated that the statutes invoked by the Bureau do not restrict "how" it shall implement them, but provide it with

petitioners' overcharge claim, upholding the Bureau's sovereign act defense. *Id.* at 673-81.[35] As a consequence, the case was poised for trial on the farmers' underdelivery claim and the Bureau's claimed sovereign power defenses.

In 2000 the district court reversed itself and held that the farmers were not entitled to sue. Pet. App. C. The court now ruled that the farmers were incidental, not intended, third-party beneficiaries of the 1963 contract in light of the Ninth Circuit's decision the year before in *Klamath Water Users Protective Assn. v. Patterson*, 204 F.3d 1206, 1210-12 (9th Cir. 1999), *opinion amended on denial of reh'g*, 203 F.3d 1175 (9th Cir. 2000), *cert. denied*, 531 U.S. 812 (2000). *Id.* at 29a-34a, 45a. The court stated that the 1963 contract was entered into for the benefit of the lands in the pre-merger area, as acknowledged in Paragraph 4.2 of the stipulated judgment and several subsequent cases. *Id.* at 28a. But it ruled that more was required, an intent to create direct enforcement rights, and that such intent was not apparent. *Id.* at 30a-31a, 33a, 34a. Paragraph 3 of the stipulated judgment, which provides relief may be obtained against the Bureau for violation of the 1963 contract, the court concluded, did not so establish. *Id.* at 37a, 39a-45a. The court noted *Klamath* stated members of the public are assumed to be incidental beneficiaries of their government's contract. *Id.* at 29a.

"discretion" in such regard. *Id.* at 658. It stated that the Bureau would be in breach of any promise which "could have been honored by the reasonable exercise of the discretion afforded by Congress." *Id.* at 658-59. The court noted that the Bureau is insulated from liability only when subsequent general legislation "inadvertently" breaches a federal contract. *Id.* at 657. It also noted that, if Congress enacts legislation "targeted" to abrogate contracts, the Bureau may be sued. *Id.*

[35] *Cf., Westlands*, 134 F.Supp.2d at 1144-54 (claim to recover statutory surcharges as violation of price terms of 1963 contract not barred under either unmistakability or sovereign act doctrines).

The Ninth Circuit in the opinion below affirms. Pet. App. A at 5a-17a. Extending the rationale of *Klamath*, the court holds that the farmers were incidental, not intended, third-party beneficiaries. *Id.* at 11a-16a. That the Bureau and District intended to benefit the farmers, it holds, is not enough. *Id.* at 14a, 15a n.5. It concludes the District is a government and farmers are members of the public and, thus, are presumed to be incidental beneficiaries. *Id.* at 10a, 15a n.5. It finds no explicit intent by the contracting parties to grant farmers enforcement rights. *Id.* at 12a, 14a. The court explicitly declines to follow the Federal Circuit's contrary 1984 decision in *Allen Orchards*. *Id.* at 14a-15a n. 5. The fact farmers originally entered recordable contracts does not alter the court's conclusion. *Id.* at 15a-16a. It also rules the stipulated judgment gives them no right to sue. *Id.* at 16a. In addition, the court rejects any right to sue under 43 U.S.C. § 666(a)(2). *Id.* at 7a-8a n.3. It denies that the farmers may stand in the District's shoes. *Id.* at 16a-17a. And it rules that the Bureau is not precluded by the prior adjudications. *Id.* at 6a.[36]

SUMMARY OF ARGUMENT

The court below has denied petitioners their lawful right to sue to recover the damages they suffered when the Bureau cut off half their water and doubled the price of the rest.

Federal government contracts are construed and enforced like private contracts. *Mobil Oil Exploration and Producing Southeast, Inc. v. United States*, 530 U.S. 604, 608-09 (2000); *United States v. Winstar*, 518 U.S. 839, 887 n.32, 895 n.39, (1996) (Souter, J., plurality), 912 (Breyer, J., concurring); *Perry v. United States*, 294 U.S. 330, 352 (1935); *Lynch v. United States*, 292 U.S. 571, 579 (1934).

[36] The Ninth Circuit also vacates as nullities the district court's earlier merits rulings. Pet. App. A at 17a-20a.

Where a non-party sues as an intended third-party beneficiary, he or she must show only that the contract was intended for his or her direct benefit. *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912); *Hendrick v. Lindsay*, 93 U.S. 143, 147 (1876). Intended beneficiary status exists where the contract plainly states it is to be performed for a third-party's benefit. *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, 428 (1959). Intended third-party beneficiary status may also be implied from the language of the contract, or its surrounding circumstances. *Hendrick*, 93 U.S. at 147.

In the case at bar, intended beneficiary status is powerfully implied by the language of the 1963 contract and integrated contracts and incorporated statutes. That implication is strongly confirmed by surrounding circumstances. And, in the 1986 stipulated judgment, the parties made explicit that the farmers had been intended to benefit from performance of the 1963 contract and to possess the right to enforce it.

Several articles of the 1963 contract refer to the farmers' right to use the water sold thereunder, and one specifically provides that such right shall not be disturbed. This implies the parties mutually intended to confer on farmers the direct benefit of the Bureau's performance. This, alone, establishes intended beneficiary status under the *German Alliance* test.

Several other articles of the 1963 contract refer to the right to use water, or the remedy for not receiving it, of anyone claiming such right or remedy through or under the District. Those who claim a right or remedy through or under the District include, at the very least, its landowners and water users. These articles strongly imply the parties intended to allow the farmers to sue.

The 1963 and 1965 contracts provide that the water users pay per acre-foot charges and landowners pay per acre assessments. Other contracts are integrated with the 1963

contract, including recordable contracts between the Bureau and excess landowners. Each was made in consideration of the benefits derived under the 1963 contract, and as an inducement to the Bureau to furnish the water for such lands. Accordingly, the farmers provide to the Bureau the consideration for the water.

Each contract was explicitly made pursuant to federal reclamation law, including Section 8 of the 1902 act. As construed in four leading decisions of this Court, such law makes unmistakably clear that the farmers who apply the water to their lands perfect and preserve, and equitably own, property rights in the water which are appurtenant to their lands. *Nevada v. United States*, 463 U.S. 110, 121-28 (1983); *California,* 438 U.S. at 664, 653, 665, 667; *Nebraska v. Wyoming*, 325 U.S. 589, 611-16 (1945); *Ickes v. Fox*, 300 U.S. 82, 93-96 (1937). Furthermore, the Bureau is required to recoup project costs. Finally, districts are conduits for water in one direction and money in the other, and were required for administrative convenience.

The contracts between the Bureau and the District also explicitly provide they were made under the law of California. Under such law, water rights possess certain well-established characteristics, including appurtenancy to the land. Furthermore, districts are obligated to distribute to farmers water furnished by the Bureau.

The contract language implying intended beneficiary status is confirmed by surrounding circumstances. The farmers equitably own the water rights which were perfected and are preserved by their use of the very water sold and delivered under the 1963 contract. They do not simply enjoy an indirect economic benefit as a result of its use. They hold a property right in its usage which is appurtenant to their lands.

A water district is a surrogate created by farmers to deal with the Bureau. A district uses no water and has no source

of income except the water charges and land assessments it collects from farmers. A water district is a government only in a nominal sense, as its functions and purposes are limited to water distribution to, and money collection from, its farmers.

If there was ever any doubt as to whether the contract language and surrounding circumstances implied intended beneficiary status—and petitioners contend there was none—the 1986 stipulated judgment definitively removed such doubt. Indeed, it expressly confers such status on farmers. Paragraph 4.2 provides: "The District acknowledges that it entered into the 1963 contract for the benefit of [the pre-merger area] and the lands therein." Furthermore, Paragraph 3 provides that "any other appropriate relief may be obtained against the Federal parties by the filing of a new action for violation of . . . any contract or other right or obligation arising independently of this Judgment . . . ." Thus, the parties made explicit in 1986 what had been implicit for over 20 years.

Finally, in the 1979-1986 litigation and in the subsequent cases between the farmers and the Bureau, the Bureau either lost challenges to the farmers' right to sue, or raised no such challenges. Accordingly, the Bureau is precluded from questioning such right at this late date.

ARGUMENT

I. THE FARMERS ARE INTENDED BENEFICIARIES, BECAUSE INTENT TO CREATE SUCH STATUS IS IMPLIED IN THE LANGUAGE OF THE CONTRACT AND THE SURROUNDING CIRCUMSTANCES AND IS EXPRESSED IN THE STIPULATED JUDGMENT

The government's power to make binding contracts is an important element of sovereignty. *Winstar*, 518 U.S. at 884 n.28, 894 n.38 (Souter, J., plurality); *Perry*, 294 U.S. at 353.

The government may not simply repudiate its contractual obligations. *Winstar*, 518 U.S. at 903 n.51 (Souter, J, plurality), 912 (Breyer, J., concurring), 924 (Scalia, J., concurring); *Perry*, 294 U.S. at 351; *Lynch*, 292 U.S. at 580. If it is allowed to breach its contracts without providing relief to the persons injured, its credibility will be undermined and its capacity to make contracts will be compromised. *Winstar*, 518 U.S. at 883-86 (Souter, J., plurality); *Lynch*, 292 U.S. at 580. It may not shift the burdens of subsequent political action to its contractors where those burdens should properly be borne by the public as a whole. *Winstar*, 518 U.S. at 883, 896-97 (Souter, J., plurality). Finally, for every wrong there should be a remedy. *Marbury v. Madison*, 5 U.S. 137, 162-63 (1803).

Federal common law governs the validity and construction of a contract obligation of the government. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 519 (1988). In particular, the federal common law applies to reclamation contracts made with water districts by the Bureau. *Ivanhoe*, 357 U.S. at 289. When the government makes a contract, its rights and duties are governed generally by the law applicable to private contracts. *Mobil Oil*, 530 U.S. at 607; *Winstar*, 518 U.S. at 887 n.32, 895 n.39 (Souter, J., plurality), 912 (Breyer, J., concurring); *Perry*, 294 U.S. at 352; *Lynch*, 292 U.S. at 579.

A federal government contract is construed in terms of the parties' intent, as revealed by language and circumstance. *Winstar*, 518 U.S. at 911 (Breyer, J., concurring); *Perry*, 294 U.S. at 348-49. The terms are to be found in part in the statutes under which they are made. *Mobil Oil*, 530 U.S. at 609; *Lynch*, 292 U.S. at 577. They are also found in related agreements to which the contract refers. *Winstar*, 518 U.S. at 861-68 (Souter, J., plurality).

This Court has upheld contractual claims by intended third-party beneficiaries. *Crumady*, 358 U.S. at 428; *Hendrick*, 93 U.S. at 149. The proper test is whether the parties to the

contract intended it to be for the third-party's direct benefit, so as to entitle him or her to sue. *German Alliance*, 226 U.S. at 230; *Hendrick*, 93 U.S. at 147. The principles of federal common law apply to such claims against a federal agency. *Audio Odyssey, Ltd. v. United States*, 255 F.3d 512, 520 (8th Cir. 2001); *Holbrook v. Pitt*, 643 F.2d 1261, 1270 n.16 (7th Cir. 1981).[37]

Where a contract explicitly states the benefit of performance is in the third-party, intended status is established. *Crumady*, 358 U.S. at 428; *Woolard v. JLG Industries, Inc.*, 210 F.3d 1158, 1168-70 (10th Cir. 2000); *Avco Delta Corp. v. United States*, 484 F.2d 692, 701-03 (7th Cir. 1973), *cert. denied*, *Canadian Parkhill Pipe Stringing Ltd. v. United States*, 415 U.S. 931 (1974). A non-party to a federal contract may also sue the government where the parties impliedly intended performance of the contract to benefit him or her. *E.g., Carlow,* 40 Fed.Cl. at 781; *Schuerman*, 30 Fed.Cl. at 433.

The language employed in the contract is one element to be considered in determining the intentions of the parties. *Hendrick,* 93 U.S. at 147. But it should be considered in connection with the subject matter of the contract, the situation of the parties, the thing to be done, and the surrounding circumstances. *Id.* In particular, such intent may be implied where the beneficiary was reasonable in relying on

[37] Federal courts allow persons who were not signatories to a federal contract to sue the federal government as an intended beneficiary thereof. *E.g., Airplane Sales International Corp. v. United States*, 54 Fed.Cl. 418, 421 (2002); *Guardsman Elevator Co. v. United States*, 50 Fed.Cl. 577, 582-84 (2001); *Carlow v. United States*, 40 Fed.Cl. 773, 779-83 (1998); *Schuerman v. United States*, 30 Fed.Cl. 420, 427-34 (1994); *Busby School of Northern Cheyenne Tribe v. United States*, 8 Cl.Ct. 596, 601-02 (1985).

the promise. *E.g., Carlow*, 40 Fed.Cl. at 781; *Schuerman*, 30 Fed.Cl. at 431.[38]

Two cases have held that farmers may sue a federal water agency for breach of its contract with their water district. *Allen Orchards*, 749 F.2d at 1576; *Henderson County Drainage District No. 3 v. United States*, 53 Fed.Cl. 48, 50-52 (2002), *reconsideration denied*, 55 Fed.Cl. 334 (2003). Both found that surrounding circumstances implied the district and the government intended performance to benefit the farmers.

The facts of *Allen Orchards* were that in 1905 the Bureau constructed the Yakima Project in eastern Washington. It initially contracted directly with farmers to provide them with water. After the 1926 amendments to the reclamation act, farmers established under Washington law ten irrigation districts, and each district made a repayment contract with the Bureau. In 1937 this Court analyzed the water rights of the farmers in the *Ickes* case. 300 U.S. at 95-96. In 1943 the Court of Appeals for the D.C. Circuit affirmed that the water rights were property of the farmers, water was to be distributed under state law priorities, the quantity was to be determined by use, and use is reasonable where water is diverted and applied using methods customary in the locale. *Fox v. Ickes*, 137 F.2d 30, 33, 35 n.9 (D.C. Cir. 1943), *cert.*

[38] The normal principles of third-party beneficiary law have been restated. A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty. *Restatement (Second) of Contracts* § 304. Promises to render performance require a manifestation of intention to give the benefit of the performance to the beneficiary. *Id.* at Comment c. A beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. *Id.* at § 302(1)(b). If the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him, he is an intended beneficiary. *Id.* at Comment d.

denied, 320 U.S. 792 (1943). In 1945 still further litigation seeking to determine the specific water rights of project farmers was resolved by consent decree. Under that decree, senior water rights were not proratable, whereas junior water rights were proratable, in the event of shortage. Thereafter, the districts and the Bureau made new or amended reclamation contracts which incorporated the consent decree. In 1977, a drought year, the Bureau initially projected that the junior right holders would be able to buy only a small portion of the water to which they were otherwise entitled. They responded by fallowing much of their land. A wet spring, however, ultimately resulted in deliveries aggregating 70% of normal. About 160 out of many thousands of junior right holders, who had been unable to persuade any of their districts to sue the Bureau, sued it themselves, claiming that the initial estimate violated an implied promise in their districts' contracts. The claims court ruled, among other things, that the farmers could not sue the Bureau directly. *H.F. Allen Orchards v. United States*, 4 Cl.Ct. 601, 607-13 (1984). However, the Federal Circuit reversed on this point only, holding as follows:

> "[W]e disagree with the Claims Court's determination that appellants were not correct parties to sue under the consent decree and subsequent alleged implied contracts. It is undisputed that appellants have a property right in the water to the extent of their beneficial use thereof. *Fox v. Ickes*, *supra*. The irrigation districts, which contracted with the Bureau, act as a surrogate for the aggregation of farmers. They use no water themselves. The farmers ultimately pay for all the services which the government supplies. It is clear that the appellants, owners of the property at issue, the water, also are intended third-party beneficiaries of the 1945 Consent Decree. Under the rules of the Claims Court 'every action shall be prosecuted in the name of the real party in interest.' Claims Court R. 17(a). Here the farmers, owners of the water and beneficiaries of the irrigation projects, are the true parties in interest." *Allen Orchards*, 749 F.2d at 1576.

Henderson is similar as to facts, reasoning, and outcome. In 1913 farmers created a district to protect their farmland by constructing and operating drains and levees. In the 1930s the United States Army Corps of Engineers constructed and thereafter operated a related navigation channel. In 1961 the district made a contract with the Corps to settle claims arising from the Corps' operation of its project. More than three decades after the contract was made, farmers within the district sued the Corps to enforce it. The Court of Federal Claims held that the farmers were entitled to sue, finding that they would be reasonable in relying on the promises made by the Corps to the district in the contract as manifesting an intent to create such a right. 53 Fed.Cl. at 52.

Here, the 1963 contract implied that the parties intended that the farmers would directly benefit from performance and, thus, be entitled to sue. *German Alliance*, 226 U.S. at 230. Such intention was implied in the language of the contract and, as in *Allen Orchards* and *Henderson*, in the surrounding circumstances. Later, such intention to benefit and the resulting right to sue were made explicit in the stipulated judgment.

II. THE CONTRACTUAL LANGUAGE IMPLIES THAT THE FARMERS ARE INTENDED BENEFICIARIES

In upholding the right of an intended third-party beneficiary to sue for breach of a contract to which he was not a party, this Court held: "In construing letters like those on which this suit is based, the language employed is one . . . element to be considered in arriving at the intention of the writers." *Hendrick*, 93 U.S. at 147. Under ordinary principles of contract law, the Court construes a federal contract in terms of the parties' intent, as revealed by "language"

and circumstance. *Winstar*, 518 U.S. at 911 (Breyer, J., concurring).

The court below does not correctly analyze the language of the 1963 contract. It construes Articles 11(b) and 15 unduly restrictively. It ignores other recitals and articles of the contract, and fails to take account of other integrated contracts. It disregards the federal statutes incorporated therein. It also disregards incorporated state water law. Due account of the contract and related language compels the conclusion the farmers are intended beneficiaries.

A. Certain Articles of the 1963 Contract Imply That the Farmers Were Intended to Benefit From its Performance

The Ninth Circuit's reading of Article 15 of the 1963 contract is unduly restrictive. The first sentence of Article 15 refers to the "right to any water" furnished thereunder possessed by any "tract of land or water user" in the District. JA 45. The court concludes this sentence does not establish that farmers possess enforceable rights "against the government." Pet. App. A at 12a. Similarly, the third sentence of Article 15 states that payment is a prerequisite to "the right to the use of water" and no "water user" shall demand water unless the required charges have been paid. *Id.* at 11a-12a. The court acknowledges this defines in part the farmers' rights to water as provided by the District. *Id.* at 13a. But such rights, it again concludes, "are against Westlands, not the government." *Id.* at 12a.[39]

This strained interpretation is wrong for two reasons. First, its premise is incorrect. An appropriative right to use water,

[39] The court does not address other articles referring to landowners' and water users' right to receive water made available under the contract, including Articles 23(a), 24(e), and 25(b). Nor does it discuss Article 3(f) which provides that the "right to the beneficial use of water . . . shall not be disturbed."

subject to prior rights, is a right "as against all the world." *Utt v. Frey*, 106 Cal. 392, 396, 39 P. 807, 808 (1895). Here, the state water rights permits issued to the Bureau in the late 1950s and early 1960s make clear farmers are the true owners of the water rights and the rights are appurtenant to their lands. Decision D-935, 1959 WL 5685 at 47-50, AER 17/459-61; Decision D-990, 1961 WL 6816 at 36-37, AER 3/97-08.

Second, even if the farmers had no property right, where, as here, the District is a promisee under a contract and the Bureau is the promisor, a farmer is also protected against the Bureau under third-party beneficiary law. *Restatement (Second) of Contracts* §§ 302(1)(b), 304, Comment c. The Ninth Circuit correctly acknowledges the farmers have a right to obtain water against the District. Pet.App. A at 12a-13a. As this Court stated in *Bryant v. Yellen*, 447 U.S. 352, 371 (1980), *reh'g denied*, 448 U.S. 911 (1980): "Nor has it been suggested that the District . . . could have rightfully denied water to individual farmers. . . . Indeed, as a matter of state law . . . the [District's water] right was equitably owned by the beneficiaries to whom the District was obligated to deliver water." The Court further noted the landowners "have a legally enforceable right, appurtenant to their lands, for continued service by the District." *Id.* at 371 n.23.[40]

Thus, Article 15 and similar provisions, which recognize farmers' rights to use the water, strongly imply that the parties to the contract intended that performance would benefit the farmers. This implication is sufficient to establish intended beneficiary status under the *German Alliance* test.

[40] For this proposition the court cited *Erwin v. Gage Canal Co.*, 226 Cal.App.2d 189,194-95, 37 Cal.Rptr. 901, 903-05 (1964) and *South Pasadena v. Pasadena Canal & Water Co.*, 152 Cal. 579, 588, 93 P. 490, 494 (1908).

B. Certain Articles of the 1963 Contract Imply That the Farmers Were Intended to Have Enforcement Rights

Article 9(c) of the 1963 contract provides the Bureau lacks certain rights with respect to water being used for irrigation by the District or "those" claiming by, "through, or under" the District. Article 11(b) provides a remedy for certain types of shortage, and such remedy is available to the District or "anyone" having or claiming to have by, "through, or under" the District the right to use the water. Article 11(c) renders that limited remedy unavailable in relation to any water actually furnished to and used by, "through, or under' the District. JA 40-41, 43, 44. Discussing Article 11(b), but not the other two provisions, the Ninth Circuit holds the contract does not evidence a farmer's right to sue, as follows:

> "Because only Westlands under the 1963 contract has direct contractual privity with the government and is obligated to pay it money, the contested language of Article 11(b) can only sensibly refer to individuals or entities to whom Westlands has contractually *assigned* its rights and duties under the 1963 contract and who are now in contractual privity with the government. It cannot establish the inconsistent proposition that these same individuals or entities are intended third party beneficiaries of the contract." (Emphasis in original) Pet. App. A at 13a-14a.

This interpretation is unduly strained on two counts. First, invoking the classical contract notion of "privity" begs the question, as the intended third-party beneficiary rule is, by definition, an "exception" thereto. *German Alliance*, 226 U.S. at 230; *Second National Bank v. Grand Lodge*, 98 U.S. 123, 124 (1878).

Second, while Article 31(a) of the 1963 contract states that "no assignment or transfer of this contract or any part thereof or interest therein shall be valid until and unless approved by

the United States," JA 55, there is no doubt that if the District were to assign the contract to another party, the latter would succeed to the District's rights and duties thereunder. But, both parties also knew—and intended—that the farmers, with or without any such assignment, would pay for and use the water. That assignees may sue does not preclude suits by farmers. It taxes credulity to suppose that, when the parties referred to "those" or "anyone" having or claiming rights "through, or under" the District, they intended to recognize rights or remedies exclusively of some possible future assignee, and not also those known and existing persons who would use and pay for the water.

Article 11(b) and similar provisions, which recognize third persons have rights and remedies through or under the District, strongly imply the farmers were, or were among, those persons.[41]

C. Other Provisions of the 1963 Contract and Other Integrated Contracts Imply That the Farmers are Intended Beneficiaries

The Ninth Circuit limits its discussion of the language to Articles 11(b) and 15 of the 1963 contract. Yet other recitals and articles thereof and other contracts integrated therewith also imply that the District and the Bureau intended the contract was to benefit the farmers and, thus, entitle them to sue.

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[41] This is not the first time the Ninth Circuit has interpreted the 1963 contract in favor of the Bureau. *E.g., O'Neill*, 50 F.3d at 683-85; *Peterson v. United States Department of the Interior*, 899 F.2d 799, 808-12 (9th Cir. 1990), *cert. denied*, 498 U.S. 1003 (1990); *Barcellos & Wolfsen*, 899 F.2d at 824-25. Each such decision emphasized the unmistakability doctrine. *O'Neill*, 50 F.3d at 686; *Peterson*, 899 F.2d at 812; *Barcellos & Wolfsen*, 899 F.2d at 824-25 n.18. Each was also decided prior to this Court's *Winstar* decision.

The recitals and Articles 1(a), 5, and 12 of the 1963 contract manifest the existential facts underlying the program administered by the Bureau and the function of the District. JA 30-32, 37, 44. The water was developed and is sold so that the farmers in the District can irrigate their crops.

The 1965 contract recites that the Bureau will furnish CVP water to the District pursuant to the 1963 contract, and that the District desires the Bureau to construct the distribution system in order to utilize that supply. Article 2(b) requires construction of facilities for delivery of water from the Bureau's supply works to approximately 400,000 acres of irrigable land. JA 64, 66.

Furthermore, each excess landowner in the District entered a recordable contract with the Bureau. Each provides it was made in "consideration of the direct and indirect benefits" to be derived under the terms of the 1963 contract by all his or her lands. Each provides it was made by the landowner "as an inducement to the United States to make water and distribution facilities available to the District for the excess land of the landowner." JA 92, 93.

These related contracts further confirm that the Bureau and the District intended that the farmers enjoyed the benefits and bore the burdens of the 1963 contract.

D. Federal Reclamation Statutes Incorporated in the Contracts Imply That Farmers are Intended Beneficiaries

The preamble of the 1963 contract states it was made "in pursuance generally" of the 1902 act and acts amendatory thereof or supplementary thereto. JA 30. It also recites the District desires to contract "pursuant to the Federal reclamation laws." JA 31. The preambles of the 1965 contract and all recordable contracts are to similar effect. JA 64-65, 92.

A government contract in effect incorporates the statutes under which it was made. *Mobil Oil*, 530 U.S. at 609 (statutes to which contracts were subject "in effect were incorporated" therein); *Lynch*, 292 U.S. at 577 (terms of contracts were found "in part in the statutes under which they are issued").[42]

In 1902 Congress enacted in Section 8 the basic property rights principles governing a reclamation project. The Bureau shall proceed in conformity with the state law of prior appropriation and honor vested rights acquired thereunder. 43 U.S.C. § 383. The water right is appurtenant to the land irrigated, and beneficial use is the basis and measure of the right to the use of the water. *Id.* at § 372.

The 1937 act authorizing the CVP provides that the Bureau may acquire all water rights necessary for project purposes. 50 Stat. 844. Section 1(a) of the 1960 act authorizing the Unit states that its construction shall not be commenced until the Bureau has secured all rights to the use of water which are necessary to carry out its purposes. 74 Stat. 156

The reclamation law also requires the Bureau to secure repayment of construction and operation and maintenance costs by land assessments or water charges. 43 U.S.C. §§ 423e, 485h.

Finally, in 1922 Congress authorized the Bureau to contract with districts, as well as farmers. 43 U.S.C. § 511. An irrigation district was resorted to by the Bureau and farmers "for convenience" in the distribution of water and the collection of charges. *Nampa & Meridian Irrigation District v. Bond*, 283 F. 569, 570 (D.Id. 1922), *aff'd*, 288 F. 541 (9th

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[42] Cases finding intended beneficiary status against a federal agency often rely on the statutes and regulations authorizing the contracts. *E.g.*, *Audio Odyssey*, 255 F.3d at 521-22; *Carlow*, 40 Fed.Cl. at 781-83; *Schuerman*, 30 Fed.Cl. at 433; *Busby School*, 8 Cl.Ct. at 602; *Holbrook*, 643 F.2d at 1271 n.18.

Cir. 1923), *aff'd*, 268 U.S. 50 (1925). In 1926 Congress directed the Bureau to contract with districts on new projects. 43 U.S.C. § 423e. The overall purpose of the 1926 legislation was the rehabilitation of projects and the insuring of their future success. 43 U.S.C. § 423f. It was "to provide relief to settlers," not "to change the policy of reclamation law." *Yellen v. Hickel*, 335 F.Supp. 200, 204 (S.D. Cal. 1971), *rev'd on other grounds*, 559 F.2d 509 (9th Cir. 1977), *on reh'g*, 595 F.2d 524 (9th Cir. 1979), *rev'd and vacated in part sub nom., Bryant*, 447 U.S. 352. The formation of such districts is "merely for administrative expediency." *Yellen v. Hickel*, 352 F.Supp. 1300, 1306 (S.D. Cal. 1972), *rev'd on other grounds*, 559 F.2d 509, *on reh'g*, 595 F.2d 524, *rev'd and vacated in part sub nom., Bryant*, 447 U.S. 352. One court has described an irrigation district's interest in a federal project as a contractual right to manage facilities. *Truckee-Carson Irrigation District v. Secretary of Interior*, 742 F.2d 527, 530-31 (9th Cir. 1984), *cert. denied*, 472 U.S. 1007 (1985).

Consideration of these federal reclamation statutes confirms that the Bureau and District intended that farmers were to benefit from performance of the 1963 contract and, accordingly, may sue to enforce its terms.

E. State Law Incorporated in the Contracts Implies That Farmers are Intended Beneficiaries

The 1963 contract also recited the District desired to contract pursuant to "the laws of the State of California." JA 31. Under Article 22 of the 1965 contract, the Bureau reserves the right to make regulations which are "consistent with . . . the laws of . . . the State of California." JA 82. The California law of prior appropriation and water district law further demonstrate the farmers were intended beneficiaries.

Appropriative water rights are private property rights to divert a specified quantity of water for actual beneficial uses. *Joerger v. Pacific Gas & Electric Co.*, 207 Cal. 8, 23-26, 276 P. 1017, 1025-26 (1929). Appropriative water rights are real property and appurtenant to the lands watered. *Wright v. Best*, 19 Cal.2d 368, 378-79, 121 P.2d 702, 709 (1942); *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 724, 93 P. 858, 861-62 (1908). A thing is "appurtenant to land when it is by right used with the land for its benefit. . . ." Cal. Civil Code § 662. Such rights are usufructuary in nature. *State v. Superior Court of Riverside County*, 78 Cal.App.4th 1019, 1025, 93 Cal.Rptr.2d 276, 281 (2000). Any person who wishes to appropriate water must apply for a permit from the State Water Resources Control Board. Cal. Water Code §§ 1201, 1250. The State Board issues a permit if unappropriated water is available and the proposed use is beneficial. *Id.* at §§ 1240, 1255, 1375. An appropriative water right gives the appropriator the right to take and use the water, is inchoate until perfected, and vests at the time the water is actually diverted and beneficially used. *Id.* at §§ 1225, 1381, 1450, 1455, 1610; *Yuba River Power Co. v. Nevada Irrigation District*, 207 Cal. 521, 526-28, 279 P. 128, 130-31 (1929). A water right is measured by, and limited to, "such water as shall be reasonably required for the beneficial use to be served . . ." Cal. Water Code §100. An appropriator is entitled to make a reasonable use of the water according to "the general custom of the locality," so long as it does not involve unnecessary waste. *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 Cal.2d 489, 546-47, 45 P.2d 972, 997 (1935); *Barrows v. Fox*, 98 Cal. 63, 64, 32 P. 811, 811-12 (1893). When a person entitled to use water fails to use any part of it for a period of five years, such unused water may revert to the public and be regarded as unappropriated water. Cal. Water Code § 1241; *Erickson v. Queen Valley Ranch Co.*, 22 Cal.App.3d 578, 582, 99 Cal.Rptr. 446, 448 (1971). Finally: "As between appro-

priators, the one first in time is the first in right." Cal. Civil Code § 1414. "[W]ater right priority has long been the central principle in California water law." *Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1242, 5 P.3d 853, 864 (2000).

California water districts are authorized to contract with the Bureau for irrigation water. Cal. Water Code §§ 35875 *et seq*. The right to use water shall be furnished in accord with the reclamation law and contracts. *Id*. at § 23200.

The incorporation of California law in the contracts reflects an intention of the parties to recognize farmers' rights. They equitably own the water right under the law of prior appropriation, and it is appurtenant to their lands. The District enters and performs contracts with the Bureau for their benefit. These principles imply the parties intended that farmers were to benefit from the contract and, thus, would be able to sue the Bureau to recover damages.

III. THE SURROUNDING CIRCUMSTANCES IMPLY THAT THE FARMERS ARE INTENDED BENEFICIARIES

In upholding the right of an intended third-party beneficiary to sue for breach of a contract to which he was not a party, this Court held: "In determining the sense in which the words were used, they should be considered in connection with the subject-matter of the correspondence, the situation of the parties, the thing to be done, and the surrounding circumstances." *Hendrick*, 93 U.S. at 147. Under ordinary principles of contract law, the Court construes a federal contract in terms of the parties' intent, as revealed by language and "circumstance." *Winstar*, 518 U.S. at 911 (Breyer, J., concurring).[43]

[43] Federal judges finding intended beneficiary status often rely on "circumstances." *Airplane Sales,* 54 Fed.Cl. at 421 (citing *Restatement (Second) of Contracts* § 304(1)(b)); *Carlow,* 40 Fed.Cl. at 780 (same); *Schuerman*, 30 Fed.Cl. at 431 (same).

Four circumstances confirm the conclusion that the farmers have at all times since 1963 been intended third-party beneficiaries of the 1963 contract—the property rights the farmers hold, the consideration they pay, their reasonable reliance on the implied intention of the parties, and the nature and limited function of the District.

A. The Farmers Are Intended Beneficiaries, Because They Perfected, Own, Use, and Preserve the Water Rights

In *Allen Orchards* the Federal Circuit focused on the nature of the property rights held by the farmers. It stated the farmers "have a property right in the water to the extent of their beneficial use thereof." 749 F.2d at 1576. It further stated the farmers were "owners of the property at issue, the water." *Id*. The court cited *Fox*, 137 F.2d at 33, 35 n.9. *Id*. The *Fox* court, in turn, followed this Court's decision in *Ickes*, 300 U.S. at 93-96. 137 F.2d at 33, 35.

In *Ickes* the Court held that, in a suit by farmers against the Bureau, the United States was not an indispensable party. 300 U.S. at 96-97. In so ruling, the Court noted that the farmers relied upon the appurtency and beneficial use principles of Section 8, 43 U.S.C. § 372, and of Washington law. *Id* at 93 n.2, 93-94 n.3. It stated the action challenged would deprive farmers of "vested property rights" acquired under both such laws. *Id*. at 96-97. In rejecting the Bureau's contention that ownership of the water or water rights was vested, instead, in the United States, the Court held:

> "Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the

property right of the government in the irrigation works. Compare *Murphy v. Kerr* (D.C.) 296 F. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (Id.), with the right to receive the sums stipulated in the contracts as reimbursement for costs of construction and annual charges for operation and maintenance of works." *Id.* at 95.

The Court further ruled:

> "And in [western] states, generally, including the state of Washington, it long has been established law that the right to the use of water can be acquired only by prior appropriation for a beneficial use; and that such right when thus obtained is a property right, which, when acquired for irrigation, becomes, by state law and here by express provision of the Reclamation Act as well, part and parcel of the land upon which it is applied." *Id.* at 95-96.

In *Nebraska*, this Court followed *Ickes* and rejected a claim of the government, which had intervened in an interstate water dispute. 325 U.S. at 611-16. The Court relied, again, on the appurtency and beneficial use principles, as well as the principles requiring the Bureau to conform to state law and honor farmers' water rights. *Id.* at 612-13. The Court held:

> "The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. [Citation]." *Id.* at 614.

It stated that: ". . . [I]ndividual landowners have become the appropriators of the water rights, the United States being the storer and the carrier." *Id.* at 614-15. It concluded: "We are dealing here only with an allocation, through the States, of water rights among appropriators. . . . [T]he water rights of

the landowners [are recognized]. To allocate those water rights to the United States would be to disregard the rights of the landowners." *Id.* at 615-16.

As the Court stated in *California*, a case construing Section 8 as applied to the CVP, "the Act clearly provided that state water law would control in the appropriation and later distribution of the water." 438 U.S. at 664. First, the Bureau must "appropriate, purchase, or condemn necessary water rights in strict conformity with state law." *Id.* at 665. Second, the "distribution" of water released from the federal supply facilities "to individual landowners would again be controlled by state law." *Id.* at 667. Through the history of the relationship between federal and state governments runs "the consistent thread of purposeful and continual deference to state water law by Congress." *Id.* at 653.

Finally, in *Nevada*, this Court unanimously ruled that a 1944 stipulated judgment adjudicating the water rights in a federal reclamation project was binding on the government, the farmers, and their water district and that the government was precluded from reallocating to non-irrigation uses the water governed thereby. 463 U.S. at 128-45. As a prelude to so ruling, the Court reiterated the teaching of *Ickes*, *Nebraska*, and *California*. *Id.* at 121-28. The government's attempt to reallocate water from irrigation uses, as agreed and decreed, to other uses, said the Court, "would do away with half a century of decided case law relating to the Reclamation Act of 1902 and water rights in the public domain of the West." *Id.* at 121. The Court stated:

> "The law of Nevada, in common with most other western States, requires for the perfection of a water right for agricultural purposes that the water must be beneficially used by actual application on the land.

> [Citation] Such a right is appurtenant to the land on which it is used. [Citation]." *Id.* at 126.[44]

It further stated: "[T]he beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water rights became appurtenant upon the application of Project water to the land." *Id.*[45] The Court concluded:

> "[T]he Government is completely mistaken if it believes that the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit." *Id.*[46]

That the farmers equitably own the right to beneficially use the water and it is appurtenant to their lands powerfully implies, as it did in *Allen Orchards*, intended beneficiary status. Where one person, pursuant to a contract with a carrier, delivers private property owned by a third person, the latter is an intended beneficiary of the contract.[47] Where

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[44] Under the appurtenancy rule of federal reclamation and state appropriation law, water rights under the decree attach to specific parcels to which water has been beneficially applied. *United States v. Alpine Land & Reservoir Co.*, 340 F.3d 903, 919 (9th Cir. 2003); *United States v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1075 n.18 (9th Cir. 2002).

[45] The government's ownership of the water rights, stated the Court, was "at most nominal." *Id.* The government had "mere title." *Id.*

[46] The Solicitor of the Department of the Interior followed the Court's rulings in the late 1980s and early 1990s. *E.g.*, 100 Interior Dec. 185, 193, 1992 WL 676597 (D.O.I.); 97 Interior Dec. 21, 25-27, 1989 WL 506913 (D.O.I.).

[47] *E.g., Downey v. Federal Express Corp.*, 1993 WL 463283 (N.D. Cal. 1993) (photographer is intended beneficiary of contract between developer and shipper to return transparencies); *Allred v. Bekins Wide World Van Services*, 45 Cal.App.3d 984, 989, 120 Cal.Rptr. 312, 314-315 (1975) (employee is intended beneficiary of contract between employer and shipper to return furniture).

property is injured for lack of water, the owner may sue the water supplier for breach of its promise to the city if the contract was made for the direct benefit of such owners.[48]

The farmers here enjoy far more than mere indirect economic benefit to their lands. They have an admitted right to water against the District, the promisee.[49] Thus, the Bureau, the promisor, may be sued. *Restatement (Second) of Contracts* §§ 302(1)(b), 304, Comment c. They own an equitable property right in the water sold by the Bureau to the District—the very water which is the subject matter of the contract. That right is appurtenant to their lands.

These circumstances, alone, imply with great force that the parties to the contract intended directly to benefit the farmers by its performance and, as a consequence, to allow them to sue for damages for underdeliveries.

B. The Farmers are Intended Beneficiaries, Because They Pay for the Water

The Federal Circuit in *Allen Orchards* also emphasized this circumstance: "The farmers ultimately pay for all the services which the government supplies." 749 F.2d at 1576.

The Ninth Circuit below acknowledges this circumstance. Pet. App. A at 11a-12a. But the court gives it no legal weight. *Id.* at 14a-15a n.5.

Where a producer of goods contracts to sell them to an intermediary with knowledge the intermediary will resell

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[48] *E.g., Harris v. Board of Water and Sewer Commissioners*, 294 Ala. 606, 611, 320 So.2d 624, 628 (1975) ("[T]he most direct benefit inures to the people of the City . . . who rely on these city-provided services for the protection of their property"); *Woodbury v. Tampa Waterworks Co.*, 57 Fla. 249, 253-54, 49 So. 556, 561 (1909) ("[T]he contract was intended to be for the direct and substantial benefit of the city and of its individual property holders and inhabitants").

[49] *Bryant*, 447 U.S. at 371 n.23.

them to certain buyers, the latter may sue the producer as intended beneficiaries. *E.g.*, *Reigel Fiber Corp. v. Anderson Gin Co.*, 512 F.2d 784, 787-88 (5th Cir. 1975) (cotton growers knew that ginners were buying cotton as accommodation and that merchants were ultimate buyers).

The same is true where the government is the seller. For instance, in *Airplane Sales*, 54 Fed.Cl. at 421, a salvage company made a contract with a non-profit foundation to buy aircraft hulks. The sale was conditional upon the foundation's procurement of the hulks from a United States Navy museum. Thereafter the museum made a contract to sell the hulks to the foundation. The court held that the company was an intended beneficiary of the museum-foundation contract, as both parties were "aware" of the foundation's commitment to sell the hulks to the company. *Id.*

This circumstance is relevant to a claim for excessive water charges. In *Pond v. New Rochelle Water Co.*, 183 N.Y. 330, 76 N.E. 211 (1906), for example, a water company promised a city to provide water to its inhabitants at a rate not exceeding a certain amount. The company later gave notice of its intent to charge higher rates. A customer was allowed to sue as an intended third-party beneficiary of the company's promise to the city. The court said: ". . . [W]e have a municipality entering into a contract for the benefit of its inhabitants, the object being to supply them with . . . water at reasonable rates.. . . [I]t cannot be said that this contract was made for the benefit of a stranger." *Id.* at 338.

Here, each water user pays the charge specified in the 1963 contract for each acre-foot of water delivered. Furthermore, each landowner is assessed a certain amount per acre to repay the costs of constructing the intradistrict distribution facilities. In addition, each excess landowner agreed to sell, and sold, his or her lands at a value which did not take into account the federal water supply. These circumstances imply that the

farmers were intended to benefit from performance and, therefore, to be entitled to sue for its breach.

C. The Farmers are Intended Beneficiaries, Because they Reasonably Relied on the Parties' Intent to Benefit Them

Henderson stated that implied intention may be ascertained by asking whether the beneficiary would be "reasonable in relying on the promise" as manifesting an intention to confer a right (quoting *Montana v. United States*, 124 F.3d 1269, 1273 (Fed.Cir. 1997)). 53 Fed. Cl. at 52. The government conceded that the farmers would "reasonably expect to be helped (or injured)" by the contract. *Id.* Accordingly, the court found the farmers would be "reasonable in relying on the promise" of the government to their district. *Id.*[50]

In the 1963 contract the Bureau promised it would sell 900,000 acre-feet of water each year for $7.50 per acre-foot. The 1965 contract also obligated landowners to pay per-acre assessments. At all times, the farmers have used the water to irrigate crops and paid all charges and assessments required.

In the late 1960s and early 1970s excess landowners, in reliance on Bureau promises, entered recordable contracts agreeing to sell such lands at without-water prices. The 1986 settlement explicitly recognized the farmers' intended beneficiary status and right to sue. Pursuant to the 1963 contract, as enforced in the 1986 stipulated judgment, and their recordable contracts, excess land owners sold their lands at such prices, and new settlers bought such lands. This circumstance also confirms the parties' intention to provide the farmers with the benefit of performance, as well as the consequent right to sue.

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[50] Courts often find intended beneficiary status citing the circumstance of reasonable reliance. *E.g.*, *Audio Odyssey*, 255 F.3d at 521 (quoting *Montana*, 124 F.3d at 1273); *Carlow*, 40 Fed.Cl. at 781 (same); *Schuerman*, 30 Fed.Cl. at 431.

D. The Farmers are Intended Beneficiaries, Because The District is Their Surrogate

The court in *Allen Orchards* also relied on this circumstance: "The irrigation districts . . . act as a surrogate for the aggregation of farmers. They use no water themselves." 749 F.2d at 1576.

Henderson, effectively confirms the conclusion that a water district is a surrogate for its farmers. The district there was "created" by its farmers. 53 Fed.Cl. at 50. It possessed statutory duties "to protect the farmland" by building and operating drains and "to serve [its] constituent farmers" by building and operating levees to hold back surface flooding. *Id.* "The property interests of the plaintiff landowners are served and protected by the Henderson District." *Id.* [51]

In fact and law, a district is a surrogate for farmers. A water district with a reclamation contract has been called, in practical effect, nothing but an "intermediary" resorted to by the Bureau and the farmers. *Nampa,* 283 F. at 570. The Ninth Circuit, itself, referred to the District as a "middleman." *Barcellos & Wolfsen*, 899 F.2d at 824 n.16.

A water district is properly treated for certain other purposes by this Court as a special-purpose unit, not a general-purpose government. *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 728-29 (1973) (a water district has a "special limited purpose," and the "reason for its existence" is to acquire, store, and distribute water for its farmers, not to exercise "normal governmental" authority); *Ball v. James*, 451 U.S. 355, 366-72 (1981) ("water functions

[51] Individuals who are members of or served by other special or limited government units which make a federal contract may sue the United States as intended beneficiaries. *E.g., Carlow*, 40 Fed.Cl. at 780-83 (Indian tribe); *Busby School*, 8 Cl.Ct. at 601-02 (school board); *Hebah v. United States*, 428 F.2d 1334,1338-40 (Ct.Cl. 1970) (Indian tribe).

. . . are the District's primary purpose" and such districts are public entities only in a "nominal" sense).[52]

Often an aggrieved farmer can count on a district to mount a legal challenge to political action which threatens to violate rights without payment of compensation. But there are other situations, such as the instant case, where districts fail to do so and farmers are left to fend for themselves.[53] Here, water has been reallocated, surcharges have been collected, and the remedy sought is retrospective money damages. Even if the District had been willing to sue, there exists significant doubt as to whether it would have standing to assert and recover a water user's or landowner's damages.[54]

In the situation at bar, the District conducts no agricultural or other business of its own, except to operate the internal distribution system. It facilitates the exchange of water and money between the Bureau and the farmers. The District deals in no commodity other than water, and then only for the farmers' account. It enjoys no source of income other than the charges and assessments it collects from its landowners and water users. This circumstance, too, confirms that parties

[52] California law is similar. *Wood v. Imperial Irrigation District*, 216 Cal. 748, 755, 17 P.2d 128, 131-32 (1932); *Not About Water v. Board of Supervisors*, 95 Cal.App.4th 982, 999-1000, 116 Cal.Rptr.2d 526, 536-39 (2002); *see also Just's, Inc. v. Arrington Construction Co.*, 99 Idaho 462, 465, 467, 583 P.2d 997 (1978) (local district is "the most convenient means" of financing and constructing improvements, which constitute "a direct and special benefit to the property within the district, not merely an incidental benefit shared by the general public.").

[53] An irrigation district is a trustee for the landowners and water users within it. *Bryant*, 447 U.S. at 371; *Allen v. Hussey*, 101 Cal.App.2d 457, 467, 225 P.2d 674, 680 (1950). If a trustee fails to sue a third party on behalf of a trust, the beneficiaries may do so. *Bowdoin College v. Merritt*, 54 F. 55, 60 (9th Cir. 1893); *Saks v. Damon Raike & Co.*, 7 Cal.App.4th 419, 427-28, 8 Cal.Rptr.2d 869, 875 (1992).

[54] Petitioners are aware of no case allowing a district to recover lost profits or diminished values arising from underdeliveries.

intended to confer the benefit of performance on the farmers and, thus, the right to sue.

IV. THE STIPULATED JUDGMENT EXPLICITLY PROVIDES THAT THE FARMERS ARE INTENDED THIRD-PARTY BENEFICIARIES OF THE 1963 CONTRACT

A stipulated judgment settling water rights disputes under a reclamation contract is binding on the parties, including the Bureau. *Nevada,* 463 U.S. at 128-44; *Allen Orchards*, 749 F.2d at 1576.[55]

The test of intended beneficiary status is whether the contract (or, here, stipulated judgment) was intended for the plaintiff's direct benefit. *German Alliance*, 226 U.S. at 230; *Hendrick*, 93 U.S. at 147. Such status is established where the promise is plainly made for the plaintiff's benefit. *Crumady*, 358 U.S. at 428.

In the case at bar, the Bureau, the District, representatives of pre-merger lands, and representatives of merged lands litigated various disputes between 1979 and 1986, including previous overcharges and underdeliveries by the Bureau. The case was resolved by the 1986 stipulated judgment which in part construed and in part modified the 1963 contract and enforced it as so construed and modified. JA 101-47. The stipulated judgment resolved any doubts that might have existed as to whether the farmers are intended beneficiaries.

Paragraph 4.2 of the stipulated judgment provides, as follows: "The District acknowledges that it entered into the 1963 contract for the benefit of the [pre-merger area] and the lands therein." This explicit acknowledgment by the District, in a stipulated judgment executed by and binding on the

[55] A person who is not a party to an action may enforce an order made in his or her favor. FED. R. CIV. P. 71.

Bureau, is dispositive. The parties to the 1963 contract intended to benefit directly the petitioners' lands.

Paragraph 3 allows any party to obtain relief from a violation of the stipulated judgment in certain ways. In particular, it provides that "any other appropriate relief may be obtained against the Federal parties by the filing of a new action for violation of . . . any contract or other right or obligation arising independently of this judgment . . ." In this paragraph, the parties went beyond what was required by the *German Alliance* test. They made explicit that petitioners could sue the Bureau if it breached the 1963 contract.[56]

The Court below plainly errs in its reading of Paragraph 23 of the stipulated judgment, stating it refers to a statute to which it does not, in fact, refer. It states that Paragraph 23 of the stipulated judgment provides that it shall not be considered a contract "for purposes of [43 U.S.C.] § 390uu," which is Section 221 of the 1982 act. Pet.App. A at 16a. Paragraph 23 states, instead, that the stipulated judgment is not a contract "as described in Section 203(a) of the 1982 Act," which is 43 U.S.C. § 390cc(a). The section mistakenly referenced by the court is a sovereign immunity provision which applies broadly to any type of reclamation contract. *Tacoma v. Richardson*, 163 F.3d 1337, 1340 (Fed. Cir. 1998). By contrast, the section actually referenced in Paragraph 23 applies narrowly only to new contracts or contracts providing supplemental or additional benefits. *Barcellos & Wolfsen*, 899 F.2d at 817; *Westlands*, 134 F.Supp.2d at 1119-20. The purpose of Paragraph 23, as stated by the parties in the court-approved settlement notice, was simply to declare that the stipulated judgment shall not render the acreage and rate

[56] The court-approved settlement notice advised pre-merger area farmers that their rights under the 1963 contract, by being enforced in the 1986 stipulated judgment, are "directly enforceable." AER 27/528.

provisions of the 1982 act applicable to all District lands under the narrower of the two statutes. AER 27/521, 524.[57]

The key paragraphs of the 1986 stipulated judgment, including Paragraphs 3 and 4.2, establish unmistakably that the parties intended to benefit pre-merger area lands and to allow farmers to sue for breach. The parties to the 1963 contract explicitly stated in 1986 whatever might have been needed to confirm intended beneficiary status, and more.

V. THE BUREAU IS PRECLUDED BY PRIOR JUDGMENTS FROM CHALLENGING THE FARMERS' RIGHT TO SUE FOR BREACH OF THE 1963 CONTRACT

The policies advanced by preclusion doctrines "perhaps are at their zenith" in water cases. *Nevada,* 463 U.S. at 129 n.10. Claim preclusion bars litigation of any defense that might have been asserted in a prior case. *Id.* at 130; *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 170-71 (1984); *Durfee v. Duke*, 375 U.S. 106, 112 (1963). Issue preclusion bars relitigation of a defense. *Nevada*, 463 U.S. at 130 n.11; *Chicot County Drainage District v. Baxter State Park*, 308 U.S. 371, 378 (1940), *reh'g denied*, 309 U.S. 695 (1940); *United States v. Moser*, 266 U.S. 236, 242 (1924).

In the case at bar, the Bureau has unsuccessfully litigated, and has missed several other opportunities to litigate, its defense that farmers are not entitled to sue for breach of the price and delivery terms of the 1963 contract.

During the early stages of the 1979-1986 litigation, the district court held, in a published opinion, that the farmers

[57] The court below also notes the district court's statements about the recovery of money damages. Pet.App.A at 16a n.7. Damages are "always the default remedy for breach of contract." *Winstar*, 518 U.S. at 885 (Souter, J., plurality). Damages are a proper remedy if the farmers are intended beneficiaries. *Westlands*, 134 F.Supp.2d at 1156 n.97; *Sumner Peck Ranch*, 823 F.Supp at 746.

could sue to enforce the 1963 contract price and quantity articles. *Barcellos & Wolfsen*, 491 F.Supp. at 266-67. Paragraphs 3 and 4.2 of the 1986 stipulated judgment specifically decree that the farmers were intended to benefit from performance of the 1963 contract and could sue for its breach.

In subsequent cases, farmers continued to sue the Bureau for breach of the 1963 contract. Two suits raised claims under the price terms. *Barcellos & Wolfsen*, 899 F.2d at 816, 824-25 n.17; *Westlands*, 134 F.Supp.2d at 1117-18, 1138-39. One involved claims under the quantity terms. *O'Neill*, 50 F.3d at 682. In none of these cases did the Bureau contend that the farmers were not entitled to sue.

For these reasons, the Bureau is barred at this late date from denying petitioners' right to sue under the doctrines of claim and issue preclusion.

CONCLUSION

This Court should reverse the holding of the Ninth Circuit that the petitioners were not entitled to sue the Bureau. Pet. App. A. at 5a-17a. It should also reverse its holding that the district court rulings on the merits be vacated as nullities. *Id.* at 17a-20a. The Court should remand the case to the Ninth Circuit with direction to review the district court's merits rulings.

Respectfully submitted,

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